IN THE

# Supreme Court of the United States

October Term, 1979

No. 79-468

JOHN R. WINEGARD,
*Petitioner,*

vs.

SALLY ANN GILVIN,
a/k/a Sally Ann Winegard,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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SUBJECT INDEX

TABLE OF CITATIONS



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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

Petitioner, John R. Winegard, respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered in this proceeding April 25, 1979.

OPINION BELOW

The Opinion of the Supreme Court of Iowa is reported at 278 N.W.2d 505 and appears in the Appendix hereto., The opinions and judgment of Des Moines District Court were rendered in four

segments, unreported, and appear in the Appendix hereto.

## JURISDICTION

The judgment of the Supreme Court of Iowa was entered April 25, 1979. A timely petition for rehearing was *en banc* denied June 25, 1979. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## QUESTION PRESENTED

Is a state constitutionally prohibited from giving full faith and credit to a divorce decree of a foreign state lacking jurisdictional minimum contacts?

## CONSTITUTIONAL PROVISIONS INVOLVED

*Section 1, Article IV, United States Constitution:*

> "Full Faith and Credit shall be given in each State to the * * * judicial Proceedings of every other State. * * * "

*Fourteenth Amendment, United States Constitution:*

> " * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * * ."



## STATEMENT OF THE CASE

This case results from an action filed by Sally Gilvin in Iowa to dissolve an alleged common law marriage with John Winegard.

The action was contested for the reason, among others, Sally Gilvin's earlier divorce decree from Franklin Gilvin was void for want of jurisdiction of Nevada Court. The issue was initially raised in John R. Winegard's Answer.

It was stipulated Franklin Gilvin was living at time of Iowa trial. July 31, 1969, Sally Gilvin filed Complaint for Divorce against Franklin Gilvin in the Eighth Judicial District Court of the State of Nevada. The Complaint recited:

> " * * * [F]or a period of longer than six weeks prior to date of verification of this Complaint, plaintiff [Sally Gilvin] has been and now is a bona fide and actual resident and domiciliary of the State of Nevada and has been actually and physically present in said State for more than six weeks prior to the commencement of this action."

The Complaint was sworn to by Sally Gilvin. She swore she read the Complaint and knew its contents. She swore the contents were true.

Franklin Gilvin never appeared; a default was entered.

Sally Gilvin testified in the Nevada proceedings:

> "Q When you [Sally Gilvin] came here on June 18th, 1969, did you come with the intention of making your home here for an indefinite period of time?
> A Yes.
>
> Q Is that still your intention today?
> A Yes."

Sally Gilvin later admitted in Iowa District Court proceedings that she lied to the Nevada District Court:

> "Q * * * Did you [Sally Gilvin] go to Las Vegas for the purpose of getting a divorce from Franklin Gilvin or for the purpose of taking up residence in Las Vegas? * * *
> [A] To get a divorce. * * *
>
> [Q] You never intended to permanently become a resident of Las Vegas * * *
> [A] No."

Franklin Gilvin was never a resident of Nevada; Sally Gilvin and Franklin Gilvin were never in Nevada together.

Sally Gilvin's misstatements to the Nevada Court resulted in the Iowa District Court finding:

> "The evidence reveals that Sally's intent when she went to Las Vegas was to get a divorce. Prior to her court hearing from which the above testimony was taken [where Sally falsely testifies she is a Nevada resident], Sally had moved out of her apartment, had shipped what personal belongings she did not carry back to her home, had stopped at the utility companies and terminated the utility services, and had purchased airline tickets for the return trip. John accompanied her on the last day and drove her to the courthouse and waited until the divorce proceedings were over and then drove to the airport and departed Las Vegas. Sally did not have a bank account in Las Vegas; she did not have a Nevada driver's license; she was not employed during her stay in Las Vegas; and in fact, it can be only concluded that her purpose for going to Las Vegas was to secure a Nevada divorce."



It is indisputable Sally had no residency in Nevada. When questioned in Iowa District Court, she admitted she lied to the Nevada court to obtain a quick divorce.

Despite conclusive evidence in Iowa District Court concerning Nevada jurisdictional defects resulting in fraudulent Nevada decree, Supreme Court of Iowa gave full faith and credit to the fraudulently obtained Nevada Gilvin decree, holding John estopped from attacking it. *See*

*In re Marriage of Winegard*, 278 N.W.2d 505, 509 and 510 (Iowa 1979).

Other reported appellate decisions indirectly connected with this case include *In re Marriage of Winegard*, 257 N.W.2d 609 (Iowa 1977); *Winegard v. Larsen*, 260 N.W.2d 816 (Iowa 1977); and *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), *cert. denied*, 436 U.S. 905 (1978).

## REASONS FOR GRANTING THE WRIT

Supreme Court of Iowa held estoppel and laches precluded John from collaterally attacking the fraudulently obtained Nevada Gilvin decree even recognizing:

> " * * * [T]he effectiveness of the laches argument is limited by John's possible lack of standing to make any challenge * * * ."
> *In re Marriage of Winegard*, 278 N.W.2d 505, 510 (Iowa 1979).

Before the Iowa action, John R. Winegard had no reason to challenge the Nevada decree. He did not know of the fraud committed and had no interest in it in any event. Upon the filing of the Iowa action, John R. Winegard became an interested party, even though he was not a party to the Gilvin action.

The Iowa court felt the interest of society requires a prompt attack to any defective decree.



John's attack came as early as reasonably possible based on his knowledge and interest. Prior to the Iowa action, John R. Winegard had no knowledge of Sally's perjury in Nevada.

The interest of society requires minimum contacts as a prerequisite to jurisdiction. The interest of society is not in having foreign states uphold fraudulently obtained decrees of divorce. It is not in society's interest to reward the perpetrator of a fraud. Perjury or fraud on the court is the most serious of frauds.

A divorce rendered in one state may be collaterally impeached in another state by proof that the court which rendered the decree lacked jurisdiction because of want of domicile on the part of both parties even though the record in that court purports to show jurisdiction. *Williams v. North Carolina*, 325 U.S. 226 (1945).

Only Sally Gilvin appeared in the 1969 Nevada proceeding. The proposition that a decree such as the Gilvin decree is subject to attack is well settled and is not novel. The question here is not whether the decree may be attacked, but whether the attack may be denied.

The question in *Winegard v. Gilvin* is whether Iowa is constitutionally prohibited from giving full faith and credit to the Gilvin Nevada

divorce decree because Nevada lacked minimum contacts constitutionally essential to jurisdiction. That issue is novel and has national importance.

What is the teaching of *Shaffer v. Heitner*, 433 U.S. 186 (1977)?

> "The primary teaching of Parts I - III of today's decision is that a State, in seeking to assert jurisdiction over a person located outside its borders, may only do so on the basis of minimum contacts among the parties, the contested action, and the forum State." *Shaffer v. Heitner*, 433 U.S. 186, 220 (1977)(Brennan, J., dissenting).

Sally Gilvin, not John, perpetrated the fraud on the Nevada court. Sally Gilvin perpetrated the Nevada fraud because *she* wanted to divorce Gilvin.

At Gilvin divorce proceeding, Sally testified:

> "Q You allege in your complaint that the marriage became incompatible. Is it not a fact that you couldn't get along together?
> A Right.
>
> Q And that you argued and fought all the time with each other?
> A Yes.
>
> Q And that he drank to excess and was mean to your daughter by a previous marriage?



> A Yes.
>
> Q Also that he didn't want you to have any friends and didn't want you to see any of your friends, is that correct?
> A Yes.
>
> Q Is it also a fact that you drifted further and further apart so that you had just a marriage in name only?
> A Yes.
>
> Q And that each of you did go your separate ways, is that correct?
> A Yes."

At the time of Gilvin divorce there was no engagement between John and Sally. The record in the Iowa court does not demonstrate contemplation of marriage between John and Sally prior to April 4, 1970. She married Gilvin October, 1968.

> "Q Between 1967 and 1970, did you [John R. Winegard] ever ask her to marry you again? [she declined first proposal]
> A Not that I know of."

Such being the case, Sally's "divorce" from Gilvin stands on its own--unconnected with any contemplation of marriage between John and Sally. This being true, there can be no reliance by Sally on any promise or representation of John

which could logically give rise to an estoppel. Sally did not "divorce" Gilvin to marry John. Sally "divorced" Gilvin to "divorce" Gilvin.

Sally Gilvin can do nothing to purge the poisonous jurisdictional defects in the Nevada proceeding. She should not be allowed to use the fraud she is responsible for in Nevada to boot-strap herself into a fraudulent common law marriage in Iowa. Besides being bigamous, this is the type of maneuvering constitutional minimum contacts are designed to preclude. It is a fraud against each court in which Sally Gilvin has appeared and it is an affront to constitutional due process, besides being an injustice to John R. Winegard.

What is required? Such contacts as make the forum reasonable, in the context of the federal system, to require a defendant to defend; maintenance of suit must not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The absence of the necessary constitutional jurisdictional contacts in the Gilvin proceeding is virtually uncontested.

Because Sally Gilvin's spouse, Franklin, is still living, Sally Gilvin lacks the capacity to assert marriage to anyone else. *Cf.* §595.19,



*Code of Iowa* (marriages between persons either of whom has a spouse living are void).

The Constitutional jurisdictional defects in the Nevada Gilvin decree are fatal. Sally is constitutionally precluded from relying on the validity of that fraudulent decree.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and Opinion of the Supreme Court of Iowa.

Respectfully submitted,

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September 19, 1979

# APPENDIX

595.19 Void marriages. Marriages between the following persons shall be void:

1. Between a man and his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter.

2. Between a woman and her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son, or sister's son.

3. Between first cousins.

4. Between persons either of whom has a husband or wife living, but, if the parties live and cohabit together after the death or divorce of the former husband or wife, such marriage shall be valid.

Volume III, Page 2961, 1979 Code of Iowa.

IN THE DISTRICT COURT OF IOWA, IN AND FOR DES MOINES COUNTY

In Re: The Marriage of Sally Ann Winegard and John R. Winegard

Upon the Petition of
SALLY ANN WINEGARD,
Petitioner,
And Concerning
JOHN R. WINEGARD,
Respondent.

Filed October 18, 1974
Equity No. 647
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This is an action for Dissolution of Marriage. By order of the Court dated August 29, 1973, this matter came on for hearing solely on the issue of whether or not the petitioner and respondent have entered into a common law marriage relationship.

FACTS

The petitioner, age 30, became acquainted with the respondent in 1962 when she went to work for the respondent's company. From May of 1963 until January of 1971, John and Sally dated from time to time. During the off again-on-again courtship spanning eight years, Sally married twice and was divorced twice. Her first marriage occurred on October 24, 1963 to a Mr. Lonnie T. Anderkin. To that marriage one child was born, namely Wendy, who lives with Sally. The marriage



to Mr. Anderkin ended in divorce on December 7, 1966. This divorce was obtained in Las Vegas, Nevada.

On October 31, 1968, Sally married Franklin D. Gilvin and that marriage ended by divorce on September 3, 1969. The second divorce was also obtained in Las Vegas, Nevada.

On April 4, 1970, Sally and John, in anticipation of getting married, entered into an antenuptial agreement which is part of the record as Respondent's Exhibit No. 3. Shortly thereafter, Sally and John traveled to Hawaii with the intent to get married. However, just before leaving for Hawaii, John had a discussion with his daughter by a previous marriage, wherein the daughter expressed displeasure with the upcoming marriage. The trip to Hawaii did not culminate into a wedding trip as John felt he wanted to wait until his daughter had a better attitude towards the marriage.

Thereafter, from September of 1970 until December of 1970, Sally went to Ohio and resumed living with her first husband, Lonnie T. Anderkin. In December, Sally moved back and lived with her parents in Dallas City, Illinois. She dated John between December of 1970 and February of 1971, and in February, 1971, Valentine's Day,

John gave Sally an engagement ring. The engagement was known by others and plans were made to get married in Las Vegas. In March of 1971, a reaffirmation of the antenuptial agreement was signed by the parties and an application for an insurance policy was made pursuant to the antenuptial agreement.

Late that same month, John and Sally flew to Las Vegas and stayed for approximately four days. During the stay in Las Vegas, no marriage ceremony took place nor was a marriage license obtained.

Sally testified that enroute home from Las Vegas, John asked her if she still wanted to get married and she responded in the affirmative. Sally testified that at that time, John gave her a ring and told her they were the same as married and no ceremony was necessary. Sally further testified that John told her that upon their return to Burlington to tell people that they got married in Las Vegas.

In connection with this Las Vegas trip, John testified that he went to Las Vegas with the idea of getting married, but on the day before or the day of their return from Las Vegas, he told Sally he did not want to get married. Sally then became upset and wanted to know what she would



tell her relatives and friends in Burlington who were under the impression they were to be married in Las Vegas. According to John, he told Sally she could live with him for a while and he gave her a ring which he said he had no use for any more. John also testified that he told Sally at this time that she could use his name. John denies he ever stated they were as much married as anyone in Iowa and he asserts that he told her he did not want to get married.

After their return from Las Vegas, Sally and her daughter moved into John's home. They purchased some furniture and Sally kept house. They received wedding gifts from John's mother and brother, John's lawyer, and others.

Numerous credit cards were in the possession of Sally and some of the cards carried the name of Mrs. John Winegard. Numerous airline tickets in the name of Mrs. John Winegard were introduced. Christmas cards to be sent to friends and relatives with the name of John and Sally Winegard engraved on them were purchased and sent at Christmas time. Sally's daughter, Wendy, was enrolled in school in the fall of 1971, as Wendy Winegard although no adoption proceedings were instituted. A newspaper advertisement with Sally's picture that had appeared in the

Burlington Hawk Eye was introduced and the caption thereon referred to Sally as Mrs. John Winegard. John and Sally attended family gatherings, exchanged Christmas presents, received mail addressed to Mr. and Mrs. John Winegard including mail from John's attorney, Mr. Edward W. Dailey. Sally had an Iowa driver's license issued in the name of Sally Ann Winegard.

Witnesses produced on behalf of the petitioner, Sally, testified as to their belief that John and Sally were married. These witnesses include Janice Taylor, Darrell Bobo, Richard Krane, and Linda Bobo. All witnesses acknowledged that John had never told them that he and Sally were married, although Linda Bobo did testify that John, on one occasion, introduced Sally as his wife.

It is also noteworthy that an insurance policy issued to Sally in the name of Sally A. Anderkin was changed in July, 1971 by changing the name of the beneficiary to Sally A. Winegard. The reason for the change as given on the insurance form was "marriage to insured."

This policy, it is contended by Sally, was purchased pursuant to the antenuptial agreement reaffirmed prior to the parties' trip to Las Vegas in March of 1971. The insured is John



Robert Winegard, the respondent.

John acknowledged that he was aware that Sally was representing herself as his wife and that he never told her not to do so, nor did he take any action to correct the image that he and Sally were husband and wife.

The testimony reveals that the income tax return for the year of 1971 was originally prepared by John's tax consultants as a joint income tax return with Sally. When the return was presented to John for signature, John informed the tax consultant this was in error and it should be prepared as a single return. The tax consultant prepared a return showing John's status as "married filing separately and spouse not filing." This resulted in an additional tax liability of approximately $30,000.00.

According to John, he signed the second income tax returns being under the impression that they reflected that he was filing as a single individual and he was not aware that the 1971 tax returns reflected that he was married until after the dissolution action was filed. Upon discovery of the situation, John filed an amended 1971 return showing him to be a single individual. The 1972 and 1973 tax returns were filed by John as a single individual.

## CONCLUSIONS

Certain factual matters will have to be referred to, by necessity, to resolve the issues as set forth by the pleadings and arguments of counsel.

Iowa recognizes common law marriage. In re Estate of Fisher, 176 NW2d 801 (1970); Gammelgaard v. Gammelgaard, 77 NW2d 479. However, a claim of common law marriage is regarded with suspicion and will be closely scrutinized. The essential elements of a common law marriage must be shown by clear and convincing evidence. The elements and conditions necessary to establish a common law marriage are:

1) Intent and agreement in praesenti as to marriage on the part of both parties together with continuous cohabitation and public declaration that they are husband and wife.

2) The burden of proof is on the one asserting the claim.

3) All elements of relationship as to marriage must be shown to exist.

4) A claim of such marriage is regarded with suspicion and will be closely scrutinized.

See In re Estate of Fisher, supra.

Further, each case of this sort must depend upon its own facts and precedents are not of



great value.

The facts recited earlier in this opinion lead this Court to conclude that petitioner has carried her requisite degree of proof establishing a common law marriage relationship.

It is noteworthy that in addition to the facts recited earlier, John and Sally registered as husband and wife in hotel and motel rooms from time to time. While it is significant that the evidence is rather limited insofar as the parties introducing each other as husband or wife, the evidence does show a general reputation among the friends and associates of the parties of a marriage relationship which negates a conclusion that the parties were not married.

The filing of amended income tax returns as a single individual appears to be a unilateral action on the part of John and there is no showing that Sally knew of the filing. See Gammelgaard v. Gammelgaard, 77 NW2d 479 at 483.

John testified that he did not intend to be married to Sally and therefore, presumably, did not have the requisite intent in praesenti for a common law marriage. However, the evidence clearly shows that the lack of intent manifested itself upon the filing of this action and no act or course of conduct by John, save the unilateral

act of filing of the tax returns, could lead one to conclude a lack of intent to enter into a common law marriage relationship. Certainly no acts or conduct on the part of John known to Sally would lead Sally to be justified in believing they were not married.

The second issue to resolve is whether the petitioner had the capacity to enter into a common law marriage. It is contended by the respondent that the prior divorces of the petitioner obtained in Nevada were invalid or void for want of jurisdiction of the Nevada Court to decree a divorce. See 595.19(4)

Petitioner's first divorce dated December 7, 1966 was obtained from Lonnie Anderkin. The evidence reveals that Mr. Anderkin personally appeared in the proceedings through the services of an attorney. This Court is of the opinion that full faith and credit must be accorded that decree since the defendant in said action had been accorded full opportunity to contest the jurisdictional issues before the Nevada Court. See Sherrer v. Sherrer, 334 U.S. 343, 68 S. Ct. 1087, 92 L.Ed. 1429 (1948); In re Day's Estate, 131 NE2d 50 (Illinois, 1955). This result does not require the Court to examine the right of respondent herein to attack that divorce.



Petitioner's second divorce from Franklin Gilvin was granted on September 3, 1969. The evidence reveals that Mr. Gilvin was served with notice personally outside the State of Nevada but did not appear or participate in the proceedings. However, Mr. Gilvin has subsequently remarried and is presently alive.

The evidence reveals that at the hearing in Sally's divorce from Mr. Gilvin, Sally testified before the Nevada Court as follows:

Q. When did you first arrive in Las Vegas, Clarke County, Nevada?

A. June 18th, 1969.

Q. When you came here on June 18th, 1969, did you come with the intention of making your home here for an indefinite period of time?

A. Yes.

Q. Is that still your intention today?

A. Yes.

The evidence reveals that Sally's intent when she went to Las Vegas was to get a divorce. Prior to her court hearing from which the above testimony was taken, Sally had moved out of her apartment, had shipped what personal belongings

she did not carry back to her home, had stopped at the utility companies and terminated the utility services, and had purchased airline tickets for the return trip. John accompanied her on the last day and drove her to the Courthouse and waited until the divorce proceedings were over and then they drove to the airport and departed Las Vegas.

Sally did not have a bank account in Las Vegas; she did not have a Nevada driver's license; she was not employed during her stay in Las Vegas; and in fact, it can be only concluded that her purpose for going to Las Vegas was to secure a Nevada divorce.

Petitioner, in argument, asserts that:

1. The petitioner was a domiciliary of Nevada and that the Court of that state had jurisdiction to grant a divorce decree.

2. That the respondent, by assisting the petitioner in the procurement of the divorce, is estopped from asserting or challenging its validity.

3. That the respondent has knowledge of her divorce and relied on it by entering into their present marriage and has timely failed to contest it and has acquiesced in the Nevada Court's finding of jurisdiction.



4. That in the alternative, if the Court should find that she was not a domiciliary of Nevada, that the respondent has no standing to challenge the validity of that divorce since he was not a party thereto.

The Court is of the opinion that the initial question is what is the standing of the respondent to contest the validity of the petitioner's Nevada divorce. It is obvious that the respondent is asserting a collateral attack on the validity of the Gilvin divorce. Confusion exists in the cases as to what constitutes a direct attack and what constitutes a collateral attack on a foreign divorce decree, but this Court is of the opinion that an attack is regarded as direct when a proceeding is brought solely or primarily for the purpose of impeaching or overturning the foreign decree or judgment and it is collateral if the action is brought for any other purpose. See Treece v. Treece, 373 P2d 750, 12 ALR2d 717. In accepting that definition of direct as opposed to a collateral attack, it is seen that in the instant case, a case concerning a dissolution of an alleged marriage, the attack made on the previous divorce of the petitioner is a collateral attack, i.e., the case was not brought solely for the purpose of impeaching or overturning the

foreign judgment.

The rights of third persons or strangers to the divorce action to contest its validity has often been denied on the basis that the third person or stranger did not occupy any position or have any right at the time of the entry of the decree which could have been affected by the decree. See e.g. Re Hanson's Estate, 210 F. Supp. 377; Grace v. Grace, 162 So.2d 314; Johnson v. Johnson, 82 NE2d 831; Re Meier's Estate, 123 NW2d 747; 12 ALR2d 717.

The right of a second spouse to attack his spouse's prior divorce has often been denied on the basis of estoppel if it appears that the second spouse participated in the divorce proceedings by financing the divorce and being aware of the alleged fraud being perpetrated on the Court. See Kaufman v. Kaufman, 177 App. Div. 162, 163 NYS 566; Van Slyke v. Van Slyke, 152 NW 921 (Michigan 1915); Margulies v. Margulies, 157 A. 676 (N.J.,1931); Newberry v. Newberry, 184 SE2d 704 (1971); Dietrich v. Dietrich, 261 P2d 269.

In the instant case, Sally's divorce from Gilvin was financed by John. Transportation from Sally's home to Las Vegas and back was furnished by John and John was often present during Sally's



stay in Las Vegas including the day she testified as set forth herein.

More significantly, after the divorce, fairly elaborate arrangements were being made for John and Sally to get married in Las Vegas including the reaffirmation of the antenuptial agreement. John, during these arrangements, never questioned the validity of Sally's divorce nor did he ever, to Sally, set forth for not going through with a ceremony, the reason that he questioned the validity of Sally's divorce.

Petitioner did not, in so many words, plead estoppel, nevertheless, the facts pleaded and proved sufficiently raised the issue of estoppel. Mensing v. Sturgeon, 250 Iowa 918; 97 NW2d 145; Bilber v. Bilber, 205 Iowa 639, 216 NW 99.

Accordingly, this Court, based on John's knowledge of the facts and circumstances surrounding Sally's Nevada divorce from Mr. Gilvin, his participation in going to Las Vegas and assisting Sally in obtaining the divorce, the fact that Mr. Gilvin is alive and remarried on the strength of the Nevada divorce and the fact that John's refusal to go through a marriage ceremony, as such, was not based upon his questioning the validity of Sally's divorce, concludes that John is now estopped from collaterally

attacking the validity of Sally's Nevada divorce.

Regarding the issue of where the common law marriage took place or as referred to in respondent's brief, the "air space theory", the Court is of the opinion that the actions of the parties resulting in a common law marriage are not instantaneous but rather the intent and acts necessary are continuing in nature. While some of the acts may have occurred outside of Iowa, the majority of the manifestations of intent and acts necessary such as continuous cohabitation or public declarations occurred while the parties were domiciled in Iowa. There is no single act of declaration which would lead a Court to declare that as of a particular instant the parties are married, but on the contrary, it is a culmination of many things which ultimately lead to the conclusion that the parties have entered into a common law marriage.

It is the conclusion of the Court that John and Sally Winegard are husband and wife by virtue of a common law marriage.

Dated this 16th day of October, A.D., 1974.

/s/ D. B. Hendrickson
Judge of District Court
Eighth Judicial District



IN THE DISTRICT COURT OF IOWA, IN AND FOR DES MOINES COUNTY

In Re: The Marriage of Sally Ann Winegard and John R. Winegard

Upon the Petition of
SALLY ANN WINEGARD,
Petitioner,
And Concerning
JOHN R. WINEGARD,
Respondent.

Filed October 13, 1976
Equity No. 647
SUPPLEMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 16th day of October, 1974, this Court filed Findings of Fact and Conclusions of Law on the issue of the existence or non-existence of a common law marriage. Subsequently this Court allowed the respondent to reopen the Findings of Fact and Conclusions of Law for the purpose of determining what effect, if any, the admission of the petitioner indicating she had filed joint income tax returns with someone else, other than the respondent during the period of the alleged common law marriage had on the Court's conclusions.

The respondent filed numerous requests for admissions upon the petitioner regarding the filing of joint income tax returns. The petitioner failed to file any response to the request for admissions within the time limits prescribed by the Rules of Civil Procedure. Accordingly, said

requests were deemed admitted. RCP 127.

The matters admitted are conclusively established in the pending action. RCP 128. Therefore, for the purposes in this ruling, the evidence reveals that petitioner filed joint federal and state income tax returns with someone other than the respondent for the years 1971 through 1974 inclusive. Also, for the purposes of this ruling, the evidence reveals that subsequent to the date on petitioner's Nevada divorce decree from Lonnie Anderkin, Lonnie Anderkin claimed petitioner as his wife to the United States Army.

The issue, therefore, is whether the admissions by the petitioner compel this Court to conclude that the prerequisites of a common law marriage did not exist in the fact of the testimony in this record upon which this Court made its ruling in October of 1974.

The Court concludes that the admissions do not compel this Court to conclude that a common law marriage does not exist. Certainly, if standing alone or in the absence of probative evidence to the contrary, the admissions would cast considerable doubt on the conclusion of a common law marriage. See: In Re: Estate of Dallman, 228 N.W.2d 187. However, a scrutiny of the evidence previously presented leads this



Court to no other conclusion than that the elements of a common law marriage have been established notwithstanding the fact that there may or may not have been violations of income tax laws. Accordingly, the Court concludes that a common law marriage has been shown by the requisite degree of proof and no change is made in its findings and conclusions of October 16, 1974.

Dated this 13 day of October, A.D., 1976.

SIGNED: D. B. Hendrickson

IN THE DISTRICT COURT OF IOWA, IN AND FOR DES MOINES COUNTY

In Re: The Marriage of Sally Ann Winegard and John R. Winegard

Upon the Petition of
SALLY ANN WINEGARD,
Petitioner,
And Concerning
JOHN R. WINEGARD,
Respondent.

Filed February 4, 1977
Equity No. 647
SUPPLEMENT TO
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Action for dissolution of marriage. Previously the Court found that the parties were married by virtue of a common law marriage commencing in April of 1971.

The evidence reveals that the Court has jurisdiction of the parties and subject matter. The evidence further reveals that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no likelihood that the marriage can be preserved.

The issues to be decided are the questions of division of property and support arrangements, if any.

Focusing on the petitioner, the evidence reveals that she is presently 32 years of age, a high school graduate and in good health.



Following her graduation from high school in 1961 she went to work at Winegard Company performing typing and bookkeeping services. She worked at the Winegard Company until September, 1963. In October, 1963 the petitioner was married to Lonnie Anderkin and she resided in Dayton, Ohio. To that union one child was born. Her marriage to Mr. Anderkin ended in a divorce on December 6, 1966.

Petitioner married a Frank Gilvin in October, 1968 and that marriage also ended in divorce. As previously found, petitioner and respondent became married in April of 1971 and resided thereafter in a home owned by the Winegard Realty Company in Burlington, Iowa.

The petitioner testified that between September of 1963 and her marriage to the respondent in April of 1971 she held several jobs relating to office work and requiring the use of her skills in typing. She has had no further training or education since high school.

In December of 1971 the parties were going their own way and in early February, 1972 this action was filed. While petitioner has continued to reside in the family home, as has the respondent when he is in Burlington, the evidence reveals that there has not been a viable marriage

since December, 1971. Focusing on the respondent, the evidence reveals that John has been, and was at the time of the marriage, quite successful financially in a business called Winegard Company. For reasons which will be hereinafter set out, it is of little importance what the present value of the business is; however, it is sufficient to say that its net value is in excess of Five Million Dollars and John is the majority stockholder. The evidence further reveals that John's taxable income for the years indicated was as follows:

| | |
|---|---|
| 1971 - $314,521.00 | 1974 - $365,625.00 |
| 1972 - $288,436.00 | 1975 - $299,229.00 |
| 1973 - $337,437.00 | |

Relative to the corporate holdings of the respondent, the petitioner testified that she did not think she would be entitled to any portion of said assets and the Court assumes that the petitioner is making no claim to the assets, with the possible exception of an automobile and some items of furniture.

Considerable testimony was introduced relative to an antenuptial agreement which was executed by the parties approximately a year prior to April of 1971 and was reaffirmed in writing just shortly before April, 1971. This agreement, in essence, provided for an insurance



policy on John's life with the benefits payable to Sally on John's death. The agreement recited that Sally, "has agreed to accept the provisions of this agreement in lieu of all marital rights in the property now owned, or hereafter acquired, by John . . . ".

As stated, considerable testimony was introduced surrounding the circumstances relative to executing the agreement as well as whether or not John actually purchased the type of insurance policy called for in the agreement. Of some significance, the following quotations from John's testimony appear relevant to the Court:

> "Q. Do you feel you're financially able to keep the insurance policy on your life, the policy that's been identified in this action as Petitioner's Exhibit Number 24? Are you financially able to keep that in force and effect? A. I imagine, yes.
> Q. Do you have any objections to doing that? A. Yes I do.
> Q. What are those objections? A. I think it shouldn't be on my life.
> Q. What? A. Under the circumstances, I don't think I should have it on my life."

John introduced testimony concerning expenditures made on Sally's behalf since the filing of the dissolution of marriage action. The record

indicates that aside from cash, housing, automobile and miscellaneous expenses, Sally has charged the sum of $39,143.00 to various department stores from February 6, 1973 to October 23, 1975. Sally testified that among her clothing items she presently owns fifty pairs of shoes, twenty-five long dresses, forty short dresses, thirty blouses, twenty skirts, fifty purses and sixty pair of slacks. The record also indicates that the fees for petitioner's counsel total $33,428.59 of which $7,500.00 has previously been ordered to be paid by John pursuant to temporary order, and $500.00 which has been paid by Sally, leaving an unpaid balance of $25,428.59.

## CONCLUSIONS OF LAW

Upon the findings of this Court, the parties hereto are entitled to a dissolution of their marriage and the same should be granted.

The Iowa Court, in Norris vs. Norris, 174 NW2d 368 (Iowa 1970) has held that it is against public policy to permit parties to enter into an antenuptial agreement relieving the duty of a husband to support his wife. The reasons set forth in Norris vs. Norris, supra, as to why it's against public policy are certainly suspect today in light of no fault dissolution of marriage and



equal rights of the sexes. Nevertheless, the Court recognizes that if there is a change to be made, it is the duty of the Supreme Court and not the District Court. Furthermore, it readily appears that the respondent, by the testimony quoted herein, does not favor the enforcement of the antenuptial agreement.

Thus, for the reasons set forth in Norris vs. Norris, supra, and also the testimony of the respondent, the Court concludes that the antenuptial agreement is not controlling of the issues to be resolved.

The Iowa Court has set forth general criteria for courts to take into consideration when attempting to arrive at an equitable determination of financial or property rights and obligations of the parties. Schantz vs. Schantz, 163 NW2d 398 (exclusive of fault).

The Iowa Court has further held that Section 598.21 does not require that an award of alimony be made in all dissolution cases. Behrle vs. Behrle, 228 NW2d 25 (Iowa 1975). A determination of whether alimony is appropriate is to be made on an ad hoc basis under the facts peculiar to each case. In Re: Marriage of Matson, 215 NW2d 358 (Iowa 1974).

In Behrle vs. Behrle, supra, the Iowa Court

quoted with apparent approval from Pinion v. Pinion, 92 Utah 255; 67 P.2d 256, 257 (1937) the following:

> "As a general rule a young couple, married a short time, who break up with no children, would call it a misadventure in matrimony and unless the wife has suffered more than the ordinary wear and tear of matrimony or stands by the divorce to lose material benefits in economic status or loss of inheritance, no alimony ordinarily will be given."

The Court concludes that a viable marriage existed from April of 1971 to December of 1971. No children were born of the marriage, and no evidence was introduced that the petitioner suffered anything more than the "ordinary wear and tear of matrimony".

However, it is true that the petitioner stands to lose material benefits by virtue of the respondent's economic status at the time of marriage. Furthermore, the dissolution will result in a loss of inheritance, at least to the extent of her rights under the antenuptial agreement.

The Court also recognizes the petitioner's disclaimer of any participation in the respondent's corporate or business assets, but that the petitioner has become accustomed to a higher



standard of living after her marriage to the respondent which was voluntary on the part of the respondent until at least after the filing of the action in February of 1972. It is the conclusion of the Court that taking into consideration the criteria of Schantz vs. Schantz, supra, the duration of the marriage, the relative economic status of the parties, the standard of living of the petitioner established after the marriage, the potential loss of inheritance by virtue of the dissolution, the lack of evidence of petitioner's contribution towards respondent's present economic position, the lack of evidence of any unusual or extraordinary sacrifice on the part of the petitioner, her age, mental and physical health and her earning capacity, the petitioner shall be awarded the sum of $75,000.00 as a lump sum allocation of property rights in lieu of any alimony.

In addition, the Court concludes that the petitioner shall be awarded the cash surrender value of the life insurance policy that was the consideration of the life insurance policy that was the consideration of the antenuptial agreement, her clothes and personal effects, and the bedroom furniture presently used by her daughter, Wendy.

Previously the Court had ordered that the

respondent pay the sum of $7,500.00 as temporary fees and allowances for the attorney representing the petitioner. The Court is cognizant of the extraordinary preparation and various appeal which have taken place in this litigation which started almost five years ago.

Therefore, the Court concludes that the respondent should contribute an additional sum of $10,000.00 towards the fees of petitioner's attorney, taking into account the criteria set forth in Jayne vs. Jayne, 200 N.W.2d 532 (Iowa 1972) and Gabel vs. Gabel, 117 N.W.2d 501 (1962).

The court costs are assessed against the respondent. Counsel for the petitioner shall prepare a decree of dissolution in accordance with the findings and supplement to the findings and submit the same to counsel for respondent for approval as to form and submit the same to the Court for signature.

Dated this 4th day of February, A.D., 1977.

SIGNED: D. B. Hendrickson



IN THE DISTRICT COURT OF IOWA, IN AND FOR DES MOINES COUNTY

In re the Marriage of JOHN ROBERT WINEGARD and SALLY ANN WINEGARD

Upon the Petition of
SALLY ANN WINEGARD,
Petitioner,
and Concerning
JOHN ROBERT WINEGARD,
Respondent.

Filed February 18, 1977
Equity No. 647

DECREE OF DISSOLUTION OF MARRIAGE

This case having been heard with the Court having heard the testimony presented and having examined the record, finds:

1. That the Court has jurisdiction of the parties and the subject matter.

2. There has been a breakdown of the common law marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no likelihood that the common law marriage can be preserved.

3. The Court has previously filed:

   a) Findings of Fact and Conclusions of Law (filed October 18, 1974);

   b) October 13, 1976, Supplement to Findings of Fact and Conclusions of Law; and

   c) February 4, 1977, Supplement to Findings of Fact and Conclusions of Law.

The foregoing documents referred to in 3. a), b), and c) above, are incorporated herein by reference and made a part hereof.

4. Decree of Dissolution should now be entered.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the dissolution of the common law marriage of Petitioner and Respondent is granted;

2. That the common law marriage between Petitioner and Respondent is dissolved;

3. That the parties are reinstated and restored to all rights and privileges of unmarried persons;

4. Petitioner is awarded the sum of $75,000 from Respondent as a lump sum allocation of property rights in lieu of any alimony;

5. Pursuant to Supplement to Findings of Fact and Conclusions of Law filed February 4, 1977, the Petitioner is awarded the cash surrender value of the life insurance policy referred to therein, which policy shall be cancelled;

6. Petitioner is awarded her clothes and personal effects and the bedroom furniture presently used by her daughter, Wendy;

7. All property not specifically herein



awarded to Petitioner, is awarded to and is the property of John R. Winegard and shall be his alone;

8. Respondent shall contribute an additional sum of $10,000 towards the fees of Petitioner's attorney; and

9. Respondent shall pay the Court costs.

IT IS FURTHER ORDERED that the record, evidence, testimony, and pleadings of Equity No. 647 shall remain sealed and sequestered during the time between the entry of Decree and the expiration of time for appeal, and that said sealing and sequestration shall continue during the pendency of appeal if appeal is taken.

Done this 18th day of February, 1977.

/s/ D. B. Hendrickson
Judge, Eighth Judicial District of Iowa

IN THE SUPREME COURT OF IOWA

| | | |
|---|---|---|
| IN RE THE MARRIAGE OF | ) | |
| JOHN ROBERT WINEGARD and | ) | Filed |
| SALLY ANN WINEGARD | ) | April 25, |
| | ) | 1979 |
| Upon the Petition of Sally Ann | ) | |
| Winegard, | ) | |
| Appellant, | ) | 56 |
| And Concerning | ) | 60452 |
| John Robert Winegard, | ) | |
| Appellee. | ) | |
| | ) | |

Appeal from Des Moines District Court - David B. Hendrickson, Judge.

Appeal from finding of common law marriage and economic provisions of decree of dissolution. AFFIRMED AS MODIFIED.

REES, J.

This began as an appeal by the petitioner wife, Sally Ann Winegard, and a cross-appeal by the respondent husband, John Robert Winegard, from the economic provisions of a decree of marriage dissolution. Subsequently, by order



of this court, Sally was designated appellant for purposes of this appeal for noncompliance with required filing procedures. We modify the award to the petitioner, and as so modified affirm the judgment and decree of the trial court.

This protracted litigation began in February 1973, when Sally Ann Winegard filed her petition for dissolution of a common law marriage which she alleged to exist between her and John Robert Winegard. After a hearing in October of 1974, the trial court held that a common law marriage existed. John then twice applied to this court for permission to perfect interlocutory appeals, both of which applications were denied. He also unsuccessfully sought relief in the federal courts. In June, 1975 the trial court granted Sally temporary attorney fees, from which award John appealed to this court. We affirmed such award in September of 1977 in In re The Marriage of Winegard, 257 N.W.2d 609 (Iowa 1977). The opinion in Winegard above cited provides a detailed presentation of the early course of this litigation.

Following extensive discovery by both parties, a final hearing and trial on the question of dissolution and the issues of property rights and alimony was held in December,

1976. The trial court awarded Sally $75,000 as a lump sum allocation of property rights in lieu of any alimony, and ordered John to pay $10,000 toward the petitioner's attorney fees. Sally had sought an allowance of $25,428.59 for her attorney fees. During the proceedings the trial court also entered several protective orders which effectively barred Sally from discovering information contained in certain financial documents which she claimed were necessary to establish the value of the stock owned by John. In her present appeal, Sally contends the trial court erred in issuing such protective orders and alleges the aforementioned awards are inadequate under the circumstances.

In John's appeal from the ruling of the trial court, he contends: (1) the trial court erred in concluding he is estopped from challenging the validity of a Nevada divorce, which he had aided Sally in obtaining, and her resulting capacity to enter into a common law marriage; (2) the court erred in finding a common law marriage existed between John and Sally; and (3) that the court erred in its finding that an antenuptial agreement executed by John and Sally, which purports to deny Sally any alimony or property settlement from John in



the event of a dissolution of their marriage, is void as against public policy to the extent that it would bar the award of alimony and limit John's duty to support.

On the basis of the above asserted grounds for appeal, we find the following issues are before us:

(1) Is John estopped or otherwise precluded from challenging the validity of Sally's Nevada divorces and her consequent capacity to enter into a common law marriage?

(2) Does evidence in the record support the conclusion of the trial court that a common law marriage existed between Sally and John?

(3) Are the terms of the antenuptial agreement, barring alimony and a property settlement, fully enforcible against Sally?

(4) Did the trial court err in issuing the protective order regarding the federal income tax returns of the Winegard Corporation of which John is majority stockholder?

(5) Was the award of $75,000 to Sally as a lump sum in lieu of alimony adequate under the circumstances?

(6) Was the award of $10,000 to Sally to apply on the payment of her attorney fees adequate under the circumstances when the

itemization for services rendered indicated charges to her of over $25,000?

I. John contends that any purported common law marriage between himself and Sally is void ab initio since Sally had at least one spouse living at the time of the common law marriage due to alleged jurisdictional defects in two Nevada divorces obtained by Sally. John neglects to note that the Nevada decrees are entitled to a presumption of validity until shown to be invalid by one who may properly assert such invalidity. Cooper v. Cooper, 217 N.W.2d 584, 586 (Iowa 1974). Before reaching the merits of John's contentions in this regard, we must determine whether either of Sally's divorces is subject to collateral attack, and if so, whether John may launch such a collateral attack.

As a presliminary matter, we note that the scope of our review of the rulings of the trial court is de novo. In re the Marriage of Vogel, 271 N.W.2d 709, 713 (Iowa 1978).

Sally's first Nevada divorce, from one Lonnie Anderkin, who appeared by counsel at the proceedings, took place in December 1966. In Sherrer v. Sherrer, 334 U.S. 343, 68 S. Ct.



1087, 92 L. Ed. 1429 (1948), the United States Supreme Court held the Full Faith and Credit Clause of the United States Constitution barred a party from maintaining a collateral attack upon a divorce decree of a sister state where the party had participated in the proceedings of the rendering state, had an opportunity to contest the jurisdiction of the rendering state at that time, and where the decree is not susceptible to collateral attack in the state in which the judgment was entered. The practical effect of this ruling was to provide a substantial degree of uniformity regarding the vulnerability of divorce decrees to collateral attack in the states of the Union by generally requiring the law of the rendering state to permit such an attack. Three years later this rule was extended to non-parties to the initial proceeding, Johnson v. Muelberger, 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552 (1951), and specifically to a subsequent spouse of an appearing party, Cook v. Cook, 342 U.S. 126, 72 S. Ct. 157, 96 L. Ed. 146 (1951). Nevada has statutorily limited collateral attacks on Nevada divorces by third parties in Nev. Rev. Stat. § 125.185, which provides: "No divorce from the bonds of matrimony heretofore or hereafter granted by a

court of competent jurisdiction of the State of Nevada, which divorce is valid and binding upon each of the parties thereto, may be contested or attacked by third persons not parties thereto."

Due to the fact that both parties to Sally's first divorce are bound by said decree, Anderkin having appeared by counsel at the proceedings, § 125.185 of the Nevada statutes would bar a Nevada attack by John upon the divorce decree, and operation of the Full Faith and Credit Clause would produce a like effect in this state. To permit collateral attack in Iowa which could not be undertaken in the state where the judgment was rendered would be to deny the unified nature of our federal system as well as being in contravention of traditional notions of res judicata. *See* Johnson v. Muelberger, at 584-585 of 340 U.S., 476 of 71 S.Ct., 556 of 95 L. Ed. Other courts, under like circumstances have reached a similar conclusion regarding Nevada divorces. Madden v. Cosden, 271 Md. 118, 314 A.2d 128 (1974); Gutowsky v. Gutowsky, 38 Misc.2d 827, 238 N.Y.S.2d 877 (1963).

Sally's second Nevada divorce presents a different question. During the summer of 1969 she obtained a divorce from one Frank Gilvin. He did not appear, either personally or by



counsel. Thus, the Sherrer decision is inapplicable here, the jurisdictional question being left open for examination by the courts of sister states, at least upon the petition of the party absent at the original hearing, Williams v. North Carolina (hereafter noted as Williams II), 325 U.S. 226, 230, 65 S. Ct. 1092, 89 L.Ed. 1577 (1945). A question left unanswered by the Sherrer, Muelberger, and Williams II decisions is the capacity of third parties to attack the validity of ex parte divorces. This is the position from which John Winegard attempts to challenge the jurisdiction of the Nevada court which granted the second divorce.

While the Williams II opinion makes it clear that the nonappearing party to an ex parte divorce action is not barred from challenging the jurisdiction of the rendering court in a court of a sister state, the status of third parties seeking to attack the validity of an ex parte divorce is much less clear. If we look to the purpose of the Full Faith and Credit Clause, to have judgments of the courts of one state afforded the same force and effect in sister states as they are in the issuing state so as to effect a decree of national uniformity, Johnson v. Muelberger, 584-585 of 340 U.S.,

476 of 71 S. Ct., 556 of 95 L. Ed., then we would once again look to the law of Nevada regarding the legal capacity of third parties to collaterally attack an ex parte divorce. Section 125.185 of the Nevada Revised Statutes is not dispositive since the divorce decree is not necessarily binding upon each of the parties. An examination of relevant case law indicates a potential answer. To maintain an attack on a Nevada judgment, a person or entity not a party to the initial action must have had an interest in the proceedings existing at the time of judgment, not an interest arising subsequent thereto. This standard has been applied to Nevada divorces by the courts of a sister state, Evans v. Asphalt Roads & Materials Co., 194 Va. 165, 72 S.E.2d 321 (1952). Thus if we were to apply Nevada law, John would not be permitted to challenge the Gilvin divorce.

Williams II acknowledges the potentially compelling interest of states other than that issuing the decree in allowing review of the jurisdiction of the rendering court. 325 U.S. 230, 65 S. Ct. 1095, 89 L.Ed. 1582. The ramifications of a divorce may have a profound effect upon the social policy and interests of a sister state. In this matter it is difficult to



understand which, if any, compelling social policy of the State of Iowa would be furthered by permitting John to assert the invalidity of Sally's divorce from Gilvin. While it is clear that the Full Faith and Credit Clause as interpreted by the United States Supreme Court does not mandate Iowa's acceptance of the Nevada divorce decree, it would appear that Iowa is not precluded from giving the Nevada judgment full faith and credit when to do so would not be against the interest of the state regarding domestic relations. The existence of a marriage by one of the parties subsequent to the challenged divorce has been found to increase the burden on the attacking party due to the relevant interests of the state. Hobson v. Dempsey Construction Co., 232 Iowa 1226, 7 N.W.2d 896 (1943). A state interest analysis, as will be further elaborated on herein, the focal point of the Williams II opinion, would tend to favor Sally rather than John in this context.

The result which would be reached in this case by applying the Nevada position regarding collateral attack upon a divorce decree by strangers is not different from that which would be reached under existing Iowa case law. We have been hesitant to allow collateral attack upon a divorce decree by a stranger to it. Allen

v. Lindeman, 259 Iowa 1384, 148 N.W.2d 610, 616 (1967); Farr v. Farr, 190 Iowa 1005, 1007, 181 N.W. 268, 270 (1921). Although there have been instances where this court has considered the merits of a third party challenge to a divorce decree, Brett v. Brett, 191 Iowa 262, 182 N.W. 241 (1921), when directly confronted with the issue of third party standing regarding divorces, we have not allowed such an attack. When we have permitted collateral attack upon a Nevada divorce decree, the challenge has been by the nonappearing party to the initial proceeding. Cooper v. Cooper, 217 N.W.2d 584 (1974). Thus, application of the Nevada standard regarding third party standing to contest a judgment would not only be consistent with the unitary purpose underlying the Full Faith and Credit Clause, but also with Iowa law.

The trial court held John to be estopped from asserting that the Nevada court lacked jurisdiction to enter a divorce decree due to his complicity in Sally's Nevada proceedings.

There is precedent for a form of estoppel in the divorce context. Indicative is Swift v. Swift, 239 Iowa 62, 68-69, 29 N.W.2d 535, 539 (1948), where this court held that "a party against whom a void decree of divorce is granted



may be barred by laches or estoppel from attacking it." While the present case does not involve a "void" decree, the rationales employed by the court in precluding the attack are relevant here. First, the court stated: "The safety of society demands that one who seeks to overthrow an apparently valid decree of divorce should proceed with utmost promptness upon discovery of facts claimed to show its invalidity," 239 Iowa at 69, 29 N.W.2d at 539. The court in Swift then found estoppel "to be based upon the idea that one who has taken a certain position should not thereafter be permitted to change it to the prejudice of one who has relied thereon."

Both considerations are relevant to the matter before us here. John, having knowledge of any potential jurisdictional infirmities in the second Nevada decree from the time it was rendered due to his financial aid and encouragement to Sally in procuring said decree, waited until he found it in his interest to challenge the Nevada decree, a period of several years. In twice considering a ceremonial marriage to Sally, as evidenced by the antenuptial agreement and its reaffirmation, he took the position that the Nevada decree was valid, a position relied on by Sally. The effectiveness of the laches argument

is limited by John's possible lack of standing to make any challenge, but the interest of society in requiring a prompt challenge to any decree and in limiting such an attack to interested parties dictate a denial of John's claim. Likewise, that John has represented a situation to Sally inconsistent with that which he now asserts brings his action within the Swift definition of estoppel. Therefore, even if John has standing to challenge Sally's Nevada divorce, the doctrines of laches and estoppel, as set out in Swift, preclude his contesting the decree.

While there is authority contrary to the position we would adopt if basing our holding on the aforementioned Nevada law, *see* Comment, 24 U. Chi. L. Rev. 376, 378-379 (1957), application of the equitable doctrines of estoppel and laches to cases such as that at bar have been uniformly endorsed by commentators. *See* Leflar, *American Conflicts of Law*, § 226, 460-462 (3rd ed. 1977); Goodrich and Scoles, *Conflict of Laws*, § 127, 259-260 (4th ed. 1964); Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 Yale L. J. 45 (1960); Weiss, *A Flight on the Fantasy of Estoppel in Foreign Divorce*, 50 Col. L. Rev. 409 (1950); Comment, 24 U. Chi. L. Rev. 376 (1957); Note, *The Dilemma of Third*



*Party Attacks Upon Foreign Divorces*, 17 Brooklyn L. Rev. 70 (1950); and by the majority of the courts, Swift; Gilb v. Gilb, 170 Cal. App. 2d 379, 339 P.2d 176 (1959); for additional citations consult authorities listed above. Therefore, we hold the trial court did not err in finding John estopped from challenging Sally's second divorce. We specifically base our conclusion on considerations of estoppel and laches, as previously applied by this court in Swift, and those Iowa precedents limiting third-party challenges to divorce decrees. In so doing we note the Full Faith and Credit Clause does not provide unqualified protection for the second Nevada decree, although a state interest analysis, as permitted by Williams II, would in this instance favor the protection provided by the trial court.

John contends the trial court was wrong in concluding he was estopped from attacking the Nevada decree because the fact of estoppel had not been specifically pled by Sally. While preferable, it is not necessary that an estoppel be directly alleged when the operative facts from which the estoppel arises are embraced within the petition. Dierking v. Bellas Hess Superstore, Inc., 258 N.W.2d 312, 314 (Iowa 1977). Such is the case here. Since the issue of

validity of the second Nevada divorce is not properly before the court, the presumption of validity accompanying the Nevada judgment and decree leads to the conclusion that Sally possessed the capacity to enter into a common law marriage. We therefore proceed to a consideration of the remaining issues.

II. John strenuously controverts the ruling of the trial court that a common law marriage existed between him and Sally. There are three elements requisite to a common law marriage: (1) intent and agreement in praesenti to be married by both parties; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife. In re Estate of Fisher, 176 N.W.2d 801, 805 (Iowa 1970). The burden of proof lies on the party asserting its existence, and such a claim of marriage will be regarded with suspicion, there being no public policy in Iowa favoring common law marriage. In re Marriage of Reed, 226 N.W.2d 795, 796 (Iowa 1975). Upon a review of the entire record, we conclude the trial court did not err in finding a common law marriage relationship to exist.

In our holding with respect to the trial court's award of temporary attorney fees to Sally



we found, on the record at that stage of the proceedings, that Sally had presented sufficient proof to create a fair presumption of the existence of a common law marriage. We made clear we were not, at that time, finding that a preponderance of the evidence indicated a common law marriage. In re Marriage of Winegard, 257 N.W.2d 609, 615 (Iowa 1977). The precise issue now before us has not been previously determined. In addition, more evidence was presented at the trial court level subsequent to our earlier Winegard decision. Conclusions relevant to the issue of the existence of a common law marriage were set out in our prior Winegard opinion at pages 616-617 of 257 N.W.2d:

> The record discloses the following bearing on the existence of the marital relationship: (1) Sally's intent and belief with respect to her relationship with John; (2) opinions of various witnesses that the community generally regarded the parties as married; (3) continuous cohabitation by the parties since April of 1971; (4) John's failure to deny his alleged marriage; (5) John's acquiescence in Sally's use of his name and her representations to the community they were in fact married; (6) Sally's receipt of a wedding band from John; (7) hotel registrations and travel reservations wherein the parties

> were listed as Mr. and Mrs. John Winegard; (8) receipt of wedding gifts without objection by John; (9) payment by John of retail charge accounts incurred by Sally as Mrs. John Winegard; (10) mail received and sent by the parties as Mr. and Mrs. John Winegard; (11) John's consent to Sally's ownership of and designation as beneficiary under an insurance policy on his life wherein Sally was referred to as "insured's wife;" (Petitioner's ex. #22); and (12) checks endorsed by John directing payment to the order of "Sally Winegard." (Petitioner's ex. #8, #9).

The above clearly indicate the existence of a common law marriage in accord with the essential elements set out in Fisher. While John contends he lacked the requisite intent to enter into a marital relationship, we note that intent may be shown by circumstantial evidence in the common law marriage context, Winegard at 617 of 257 N.W.2d, and was shown here. The evidence submitted subsequent to the first appeal to this court, largely regarding Sally having filed a joint income tax return with someone other than John for some of the years in question, was found by the trial court to operate against the conclusion that a common law marriage existed, but not to result in the conclusion that Sally



had not met her burden of proof. Our examination of the record taken as a whole leads us to a like determination. Considered alone, the tax information would weigh against the finding of a common law marriage, but the remainder of the record sufficiently overcomes the contrary inferences which might be drawn. Therefore, we conclude that the trial court did not err in its findings and conclusions that a common law marriage existed between John and Sally.

John invites us to abolish common law marriages in Iowa. He cites little authority to support his position, and we are not inclined to accept his invitation in this regard.

III. Three of the remaining issues, all relating to the amount awarded Sally as a lump sum settlement in lieu of alimony, we address together. These, in the order in which they will be addressed, include: (1) the propriety of the protective orders entered by the trial court limiting Sally's access to tax returns of the Winegard Corporation of which John is majority shareholder; (2) the effect to be given the terms of the antenuptial agreement barring the award of a property settlement or alimony to Sally; and (3) the adequacy of the $75,000

lump sum award to Sally in lieu of alimony.

We require full disclosure of the financial conditions of parties to a dissolution proceeding in order for a trial court to make a proper award of alimony or a property settlement. In re Marriage of Schantz, 163 N.W.2d 398, 406 (Iowa 1968). While the position urged by Sally, that the true net worth of John cannot be determined without a valuation of the stock of the Winegard Corporation and that such data should have been subject to discovery, is well taken, See In re Marriage of Beeh, 214 N.W.2d 170 (Iowa 1974); In re Marriage of Cook, 205 N.W.2d 682 (Iowa 1973), we deem it unnecessary in this case to reverse the trial court as to the protective orders.

John admits the value of the stock in question to have been $5.6 million in 1969. While a precise determination of the value of the stock at the time of the common law marriage is not available, such a valuation need not be made prior to the award of a lump sum in lieu of alimony to Sally. Rider v. Rider, 251 Iowa 1388, 1393, 105 N.W.2d 508, 511 (1960). It is likely the value of the Winegard Corporation has increased since 1969 and we are satisfied that the obligation imposed upon John herein will not



greatly distort his net worth or impair his financial security.

John contends the antenuptial agreement entered into by him and Sally, both as initially signed and later reaffirmed, would bar the award of alimony or a property settlement to Sally. While acknowledging the general presumption in favor of antenuptial agreements, we have held that provisions of antenuptial agreements limiting alimony are void as against public policy. In re the Marriage of Gudenkauf, 204 N.W.2d 586, 587-588 (Iowa 1973); Norris v. Norris, 174 N.W.2d 368, 369-370 (Iowa 1970). As the lump sum awarded Sally by the trial court was in lieu of alimony, we find the antenuptial agreement did not bar such an award either as made by the district court, or as will be made later in this opinion. Public policy will not allow a party to a marriage contract to avoid his or her resulting obligation of support. Norris v. Norris, 174 N.W.2d at 370. The trial court did not err in refusing to enforce the antenuptial agreement provision regarding alimony in the case under consideration here.

We therefore turn to the consideration of the adequacy of the award to Sally. The trial court concluded $75,000 to be an adequate sum in

lieu of alimony. In the light of the Schantz v. Schantz criteria (at 405 of 163 N.W.2d) and especially John's wealth, the manner or style of living to which Sally became somewhat accustomed as a consequence of his affluence, and Sally's limited future earning potential, we conclude $140,000 to be a just and adequate lump sum award in lieu of alimony. But for the relative brevity of the marriage relationship, a greater award would have certainly been justified. The decree of the trial court is modified, and Sally is awarded the sum of $140,000 as a full and complete lump sum property settlement in lieu of alimony.

IV. Sally further appeals from the trial court's award of $10,000 from John for the payment of her attorney fees. She had sought an allowance of $25,428.59. Temporary attorney fees had been allowed earlier in the course of this litigation to Sally's counsel in the amount of $7,500. Considerable discretion is given to the trial court in the matter of setting fees. *See* Winegard, 257 N.W.2d at 618. Our examination of the record leads us to conclude that the award should have been greater. While some of the expense of this case was occasioned by the



untimely filing of certain documents and briefs by Sally's counsel, by far the majority of the time involved and costs incurred herein were caused by John's litigious nature which has not only brought the parties to this court once before, but also to the United States District Court and the Eighth Circuit Court of Appeals as well. The prior award of $7,500 for temporary attorney fees is reaffirmed, and Sally is awarded the further amount of $25,000 toward the payment of all attorney fees for services rendered at the district court level and for the prosecution of this appeal.

Needless to say, John's motion that costs and fees be assessed against Sally is hereby overruled.

In conclusion we hold: (1) Sally had capacity to enter into a common law marriage; (2) the trial court did not err in its finding that a common law marriage existed between John and Sally; (3) an antenuptial agreement cannot preclude the award of alimony; and (4) the awards to Sally by way of lump sum settlement and for her attorney fees are fixed as hereinabove stated. The decree of the trial court is modified in conformity herewith.

The judgment and decree of the trial court

is modified in the foregoing respects and this case as so modified is affirmed. Costs are assessed to appellee, John Robert Winegard.

AFFIRMED AS MODIFIED.



IN THE SUPREME COURT OF IOWA

IN RE THE MARRIAGE OF JOHN ROBERT WINEGARD AND SALLY ANN WINEGARD

Upon the Petition of
SALLY ANN WINEGARD,
Petitioner--Appellant--
Cross-Appellee,
And Concerning
JOHN ROBERT WINEGARD,
Respondent--Appellee--
Cross-Appellant.

Filed June 25, 1979
No. 60452

ORDER

After consideration by the court en banc, respondent--appellee--cross-appellant's petition for rehearing in the above-captioned case is hereby overruled and denied.

Done this 25th day of June, 1979.

/s/ W. W. Reynoldson
Chief Justice - Supreme Court of Iowa